

S.B.Civil Misc. Appeal No.841/2006

Smt. Kalawati vs. Miss Rekha and others.

Date : 3.7.2006

HON'BLE MR. PRAKASH TATIA, J.

Mr. Suresh Shrimali, for the appellant.

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Heard learned counsel for the appellant.

The appellant submitted a probate petition before the court below for obtaining probate for the will dated 23.12.1992 alleged to have been executed by one Moti Lal who was at that time of the age of only 38 years.

According to learned counsel for the appellant, deceased Moti Lal contracted first marriage with Mooli Devi who is alive and thereafter, he contracted second marriage with Vimla Devi who died leaving behind one son Avinash, non-claimant. It is also submitted that from first wife Smt. Mooli Devi, one daughter Rekha was also born. It is also submitted that Kalawati started living with Moti Lal as wife and she gave birth to son of Moti Lal who is non-claimant Manish. According to the appellant, Moti Lal executed the will on 23.12.1992 and he died on 18.8.1996. According to the learned counsel for the appellant, the appellant produced the will and proved it but the court below dismissed the probate petition filed by the appellant. It is submitted that though there are words

“under protest” above the signature of deceased Moti Lal in the will but that was because of the reason that Moti Lal had right to cancel the will at any time, therefore, he might have put the words “under protest” before signing on the will. The court below wrongly construed that fact against the appellant.

In a proceeding for grant of probate, the Court is concerned with due execution of will and further for grant of probate, the court has to see that the executant has executed the last will in appellant's favour out of his free will without any force and undue pressure and also when he was in fit state of physical and mental condition. In this case, the executant himself has put his signatures after mentioning the words “under protest”. Therefore, from the documents produced by the appellant herself, it is proved that the executant did not sign the will out of his freewill. The court below also considered the fact that the deceased was of the age of 38 years only and at that time, he executed the will by mentioning that the executant is not sure about his life, therefore, he is executing the will. In the said age and thereafter, signing the will under protest makes the document absolutely suspicious and also a document not executed by free will. Therefore, the court below has not committed any error of fact or law.

Learned counsel for the appellant also submitted that while rejecting the probate petition, the court below has passed a direction to pay amount to the non-applicant no.2

Avinash who is admittedly son of Moti Lal and was the nominee. So far as payment to nominee is concerned, that cannot be objected to by the appellant because firstly, she herself has no right and secondly, the nominee has the right to get the amount, may it be for the purpose of distribution to legal heirs, if any case is made out or if the nominee is not the heir. Therefore also, I do not find that the direction given by the court below suffers from any error.

In view of the above, this appeal, having no force, is hereby dismissed.

S.Phophaliya

(PRAKASH TATIA), J.